United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 26, 2003

TO : Celeste Mattina, Regional Director

Karen P. Fernbach, Regional Attorney

Elbert F. Tellem, Assistant to Regional Director

Region 2

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Termon Construction, Inc.

Case 2-CA-33876

This case was resubmitted for advice on whether the Employer unlawfully denied access to and filed a criminal complaint against two Union representatives who entered the jobsite to speak to represented employees.

We conclude that the Region should withdraw its outstanding complaint. The Employer lawfully denied access because the Union representatives were not engaged in protected activity. The representatives had not complied with the parties' bargaining agreement provision which accorded them jobsite access, and were otherwise interfering with employee work time. The Employer's criminal complaint was not baseless in fact because the Employer asserts that the complaint was authorized by an agent of the jobsite owner. The criminal complaint was not baseless in law because the Union representatives may have "knowingly" trespassed since they knew they had not complied with the bargaining agreement provision according them access. Finally, the criminal complaint was not unlawfully retaliatory because there is no evidence that it was filed without regard to its merit but solely to impose the costs of litigation.

The facts in this case are set forth in the prior Advice memorandum in this case dated September 21, 2001. In brief, two Union representatives entered a New York City owned jobsite on which the Employer was working without first advising the Employer of their presence as required by the parties' bargaining agreement. The Union

¹ Article X, Section 4 of the parties' contract provides that the Union "shall have the right to visit and go upon the Employer's jobs during working hours for the sole purpose of administering this Agreement, provided that the Union representative (i) shall have all required licenses or certificates to enter upon the job site, (ii) shall report to and advise the Employer's supervisor of his visit upon

representatives were questioning employees working on the job at 10:30 a.m. when the Employer appeared and ordered them off, threatening to call the police. When the Union representatives refused, the Employer left to call the police. The police arrived, arrested the Union representatives, and eventually charged them with second degree criminal trespass apparently based upon the Employer's statements. A person is guilty of criminal trespass in the second degree in New York when he or she "knowingly enters or remains unlawfully in a dwelling." ²

On July 25, the Criminal Court of New York dismissed the Employer's complaint upon a motion filed by Assistant District Attorney Sender. ADA Sender informed the Region that she had the Employer's charges dismissed because she thought the dispute was more a civil rather than a criminal matter, and also because she believed that the charges lacked prosecutorial merit.³

The Region issued complaint but then held this case in abeyance pending <u>B E & K</u>. ⁴ In August 2002, Advice requested the Region to analyze whether the Employer's criminal trespass complaint was baseless and retaliatory under <u>B E & K</u> in light of the parties' bargaining agreement and New York state law, and also to obtain the positions of the parties on these issues.

The Region found that the Employer had no property interest in the New York City jobsite and thus had no basis for denying access to the Union representatives. However, the Region also states that the Employer asserts that it did not deny access to nor file the criminal complaint against the Union representatives. The Employer contends that an unnamed NYC Housing Authority (NYCHA) agent denied access, and that NYCHA agent Picone filed the criminal complaint. In a Board affidavit, Picone contradicts the Employer and states that he did not deny access to or file the complaint against the Union representatives. Picone instead states

his arrival at the job site and (iii) shall not unreasonably interfere with the Employer's operations."

² New York PL Section 140.15.

³ ADA Sender stated that she spoke with Union counsel who demonstrated to her that the Union representatives had been within their rights to be on the Employer's premises due to the parties' bargaining agreement.

 $^{^4}$ BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

that upon the Employer's request, he provided the Employer with the telephone number of the Housing Bureau Mod-Site Task Force, which is the unit of the police department that deals with union matters concerning construction sites.

I. The Employer lawfully denied access

We assume that the Employer and not an NYCHA agent denied the Union representatives access. We also recognize that the Employer told the Union representatives that they had no right to be on the site and summarily ordered them off without any reference to their not having complied with the bargaining agreement. However, the Employer's reasons for denying the Union representatives access is not relevant to whether the representatives were engaged in protected activity at that time. In other words, the Employer's mere failure to state that the representatives were not engaged in Section 7 activity does not make their activity protected if it was not. We conclude that the Employer did not act unlawfully because in fact the Union representatives were not engaged in Section 7 protected activity when the Employer ordered them off the jobsite.

It appears that the Union representatives were talking to the Employer's employees while they were working when the Employer ordered the representatives off the site. More importantly, the Union representatives admit that they had not complied with the bargaining agreement before coming onto the jobsite. The Union representatives' presence therefore was trespassory as not sanctioned by the parties' agreement. Since the Union representatives were not engaged in protected activity, the Employer did not violate Section 8(a)(1) when it ordered them off.

II. The Employer's criminal complaint did not violate the Act

In <u>Johnson & Hardin Co.</u>, ⁷ the Board held that it would view a criminal complaint under the same standard for determining whether a civil lawsuit violates Section

⁵ Even if an unnamed NYCHA agent ordered the Union representatives off as asserted by the Employer, the Employer is still responsible for having initially sought their removal. See <u>Wild Oats Market</u>, 336 NLRB No. 14 (2001); <u>A&E Food Co.</u>, 339 NLRB No. 104 (2003).

⁶ See, e.g., <u>Villa Avila</u>, 253 NLRB 76, 81-82 (1980); <u>Peck-</u> <u>Jones Construction Corp.</u>, 338 NLRB No. 4 (2002).

^{7 305} NLRB 690, 691 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995).

8(a)(1). In <u>BE & K</u>, the Court rejected the standard set out in <u>Bill Johnson's</u> for resolving reasonably based, but unsuccessful lawsuits.⁸ The Court held that this previous standard was overly broad because it would condemn some lawsuits that were the result of genuine petitioning protected by the First Amendment, though they were ultimately unsuccessful.⁹ This means the Board may no longer rely on the fact that a lawsuit was ultimately meritless, but must determine whether or not the suit was reasonably based.¹⁰

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless." 11 The Court viewed the Board as having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself attacked protected conduct. The Court held that this standard would condemn genuine petitioning where a lawsuit was directed at conduct that a plaintiff reasonably believed was unprotected. 12 The Court also reasoned that inferring a retaliatory motive from evidence of animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal." 13 The Court left open whether any other showing of retaliatory motive could suffice to condemn a reasonably based, but unsuccessful suit. It intimated that suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for protected activity, may be unlawful. 14

As the Court in <u>BE & K</u> did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in <u>Bill Johnson's</u> remains authoritative. In <u>Bill Johnson's</u>, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board

⁸ Bill Johnson's Restaurants, 461 U.S. 731 (1983).

⁹ 122 S.Ct. 2390, 2400-2401

¹⁰ Id. at 2399-2402

 $^{^{11}}$ Id. at 2400.

 $^{12 \}text{ Id.}$ at 2400-2401.

 $^{^{13}}$ Id. at 2401 (emphasis in original).

 $^{^{14}}$ Id. at 2402. See also <u>id</u>. at 2403 (Breyer, J. concurring).

could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge. 15 Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous. 16 Thus, a lawsuit can be deemed baseless only if it is unsupported by facts or is premised on unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

We first conclude that the Employer's criminal complaint is not baseless in fact, even though the Employer had no property rights, because a factual dispute exists over whether NYCHA agent Picone authorized the Employer to call the police and file the criminal complaint. Picone's denial of complicity in the Employer's conduct is contradicted by the Employer. Under Bill Johnson's, the Board may not make credibility determinations or draw inferences from disputed facts, usurping the fact-finding role of the state court. The criminal complaint also was not legally baseless because it was not frivolous or plainly foreclosed by state law. First, as noted above, the Employer asserts that NYCHA agent Picone authorized the Employer's criminal complaint. Second, the Union representatives may have "knowingly" trespassed because they certainly knew that they had not complied with the parties' bargaining agreement, which was their sole basis for access. In sum, the criminal complaint was not baseless in law or fact.

Finally, since the complaint was well based, it was not unlawfully retaliatory because there is insufficient evidence that it was filed solely to impose the costs of litigation and was filed in retaliation against Section 7 protected activity. In $\underline{B} \ \underline{E} \ \underline{K}$, the court stated that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if a litigant would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome." We have applied this "impose-costs" standard in cases in which a

 $^{^{15}}$ 461 U.S. at 744-746. See also Beverly Health $\underline{\&}$ Rehabilitation Services, Inc., 331 NLRB 960, 963 (2000).

¹⁶ Id.

 $^{^{17}}$ <u>Same</u>, at 536-537. <u>See</u> also <u>same</u>, at 539 (Breyer, J., concurring).

lawsuit was not baseless. 18 Here, there is no evidence that the Employer filed its complaint without any regard for its merit or outcome. The Employer instead filed the complaint in a clear attempt to stop what the Employer deemed to be unlawful conduct interfering with its business. In any event, the complaint was not filed against protected activity since, as note above, the Union representatives' presence on the site was trespassory.

In sum, the Region should withdraw the outstanding complaint because the Employer did not unlawfully deny access to nor unlawfully file a criminal complaint against the Union representatives.

B.J.K.

18 See, e.g., <u>Aeqis Fire Systems</u>, Case 32-CA-19574-1, Advice Memorandum dated November 27, 2002, at 2-3; <u>Dilling Mechanical Contractors</u>, Case 25-CA-25094, Advice Memorandum dated December 11, 2002, at 7 and n. 25; and <u>Stonegate Construction</u>, Inc., Case 20-CA-30724-2, Advice Memorandum dated January 23, 2003, at 12.